APPENDIX.

EXHIBIT A.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term, 1967-68.

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3 Div. 278.

Dunbar-Stanley Studios, Inc.,

v.

State of Alabama.

Appeal from Montgomery Circuit Court, in Equity Per Curiam.

This is an appeal from a final decree of the circuit court of Montgomery County, in equity, that upheld a final assessment of license taxes made by the State Department of Revenue against the appellant imposed by the last line of Section 569, Title 51, Code of Alabama, 1940, reading:

"* * * For each transient or traveling photographer, five dollars per week."

No procedural requisites are here questioned or involved.

Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney.

Penney also did a certain amount of newspaper advertising relative to the photographic service.

When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

Appellant and appellee have both submitted elaborate and comprehensive briefs in support of their respective contentions. We have carefully reviewed the arguments and the cases cited in an effort to resolve the law applicable to the pleadings and evidence. Such a resolution is not altogether free from difficulties.

While there were interstate orders submitted to appellant for the finished product, namely, the pictures, and certain preliminary advertising by Penney in recruiting business and customers, we cannot escape the impact and pertinency of two of our Alabama decisions rendered by this court on similar photographic transactions, although in some factual areas not on all fours with the instant transactions. We do not think these factual differences effect the basic pronouncements of this court in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), and in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). We observed in the **Graves** case, supra, as follows:

> "• • • It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. • • • The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court

to a situation where there was locally performed an essential physical act in the performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

Paraphrasing **Lucas v. City of Charlotte**, 4 Cir., 86 F. 2d 394, 109 A. L. R. 297, the actual work of the photographer in the instant case and the mechanical finishing of the negatives in Charlotte, North Carolina, does not change the fact that the photographer is carrying on his business at the Penney stores in the State of Alabama.

Our observation in the **Haden v. Olan Mills, Inc.** case, supra, that the conduct of the photographer in the State is a separate and distinct incident upon which the license tax falls has merit and applies to the facts here.

We observed in **Family Discount Stamp Co. of Georgia v. State**, 274 Ala. 322, 325, 148 So. 2d. 218, that in the **Graves** and **Haden** cases, supra, "there was local activity in Alabama which could be separated from the interstate process or flow of commerce. We do not think that condition exists in this case."

We are constrained to adhere to our pronouncements in the **Graves v. State**, supra, and **Haden v. Olan Mills, Inc.**, supra, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

We hold that the license tax required of transient or traveling photographers by Section 569, supra, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce.

The decree of the trial court is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

Livingston, C. J., and Lawson, Coleman and Harwood, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 13 day of May, 1966.

J. O. Sentell,
Clerk, Supreme Court of Alabama.

EXHIBIT B.

May 13, 1968.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term 1967-68.

3rd Div. 278.

Dunbar-Stanley Studios, Inc.

v.

State of Alabama.

Appeal from Montgomery Circuit Court,
In Equity.

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is Therefore Ordered, Adjudged and Decreed that the decree of the Circuit Court be in all things affirmed.

It Is Further Ordered, Adjudged and Decreed that the appellant, Dunbar-Stanley Studios, Incorporated, a Corporation, and The Travelers Indemnity Company, sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.

EXHIBIT C.

In the United States District Court
for the District of New Mexico.

Dunbar-Stanley Studios, a partnership, Plaintiff,

vs.

Victor C. Breen, District Attorney of Quay County, New Mexico; Claude Moncus, Sheriff of Quay County, New Mexico; Clara Lewalling, County Clerk of Quay County, New Mexico; Alberta Miller, Secretary of the State of New Mexico; Earl E. Hartley, Attorney General of the State of New Mexico, Defendants.

No. 5657 Civil.

John P. Eastham and Duane C. Gilkey, for plaintiff Dunbar-Stanley Studios, a partnership.

Earl E. Hartley, Attorney General of New Mexico, Jay F. Rosenthal, Assistant Attorney General and James V. Noble, Assistant Attorney General, for the defendants.

Before Seth, Circuit Judge, and Payne and Bratton, District Judges.

Bratton, District Judge.

Plaintiff is a partnership composed of Stanley L. Hoke and Needham C. Holden, both citizens of North Carolina.

The business of the partnership is photography and a majority of the operations consists of taking and processing children's photographs. Plaintiff's principal place of business is located at Charlotte, North Carolina.

The defendant Victor C. Breen is District Attorney of the 10th Judicial District of New Mexico, which District includes the County of Quay. The defendant Claude Moncus is Sheriff of Quay County, New Mexico. The defendant Clara Lewalling is County Clerk of Quay County, New Mexico. The defendant Alberta Miller is Secretary of State of the State of New Mexico and by agreement of the parties may now be considered only a nominal party. The defendant Earl E. Hartley is Attorney General of the State of New Mexico.

Plaintiff has for many years had an informal verbal agreement with J. C. Penney Company whereby plaintiff's representatives used the facilities of local J. C. Penney stores for its operations. Typically, for some days before one or more of plaintiff's representatives appeared in a locality, the J. C. Penney store caused advertisements to be inserted in local newspapers advising the public that on certain dates plaintiff's representatives would be at the store and would take and process children's photographs at the price of fifty-nine (59¢) cents per photograph. At the times indicated, mothers appear with the children and photographs are taken by plaintiff's photographer. The exposed films are then sent to plaintiff's plant in North Carolina where they are developed and printed. The finished photographs are then returned to the J. C. Penney store which delivers them to the customer. The J. C. Penney Company store handles all the advertising, takes the orders, receives the money for the photographs and delivers the finished photographs to the customer. The local J. C. Penney store receives a percentage on each sale plus reimbursement of adver-

tising costs for such services. Plaintiff receives the balance of the payments.

Plaintiff has some ninety (90) to one hundred (100) employees so engaged in taking photographs throughout the United States and has operated in, and proposes to operate in, some fourteen (14) localities in fourteen (14) different counties in the State of New Mexico. In order to carry on such an operation it must have available at least ten (10) photographers to meet its scheduling commitments in New Mexico. The photographers go from state to state to meet schedules, and none of its photographers work exclusively in New Mexico. [There is no doubt under the facts of this case that plaintiff is engaged in interstate commerce.]

Sections 60-2-1, 60-2-2, 60-2-3, and 60-2-9, New Mexico Statutes Annotated 1953, commonly referred to as the Itinerant Vendor's Act, provide:

> Section 60-2-1. "'Itinerant vendor' defined.—The term 'itinerant vendor,' for the purpose of this article [60-2-1 to 60-2-22] shall mean and include any person, either principal or agent, who engages in either a temporary or transient business in this state, either in one locality or in traveling about the country, or from place to place, selling manufactured goods, jewelry, wares or merchandise, and it shall include peddlers and hawkers, and also those who for the purpose of carrying on their temporary or transient business, hire, lease or occupy a building, structure, tent, car, vehicle, store room or place of any kind, for the exhibition and sale of any manufactured goods, jewelry, wares or merchandise."
>
> Section 60-2-2. "Exemptions.—The provisions of this article [60-2-1 to 60-2-22] shall not apply to commercial travelers or agents selling to merchants in

the usual course of business, and it shall not apply to the sale of goods, wares, jewelry or merchandise in original packages from other states as permitted by the laws of the United States applicable to interstate commerce between the states: And, Provided, further that the provisions of this Article shall not apply to the sale of books, papers, school supplies or household machinery."

Section 60-2-3. "Operation without license unlawful.—Except as permitted by the preceding section, it shall be unlawful for any person to be engaged in any manner in the business of an 'itinerant vendor' as defined in section 3011 [60-2-1] unless such a person shall be duly licensed so to do, under the provisions of this article [60-2-1 to 60-2-22]."

Section 60-2-9. "County licenses—Fees.—Every 'itinerant vendor' before making a sale of any manufactured goods, jewelry, wares or merchandise in any county in this state, shall procure a county license from the county clerk of that county and pay the following named fees therefor, viz.:

"For each 'itinerant vendor' traveling on foot or with one (1) horse, two hundred and fifty dollars ($250) per annum;

"For each 'itinerant vendor' traveling with two (2) horses, three hundred dollars ($300) per annum;

"For each 'itinerant vendor' traveling on a bicycle, one hundred dollars ($100) per annum;

"For each 'itinerant vendor' traveling in any other manner than hereinbefore described, three hundred and fifty dollars ($350).

"For each 'itinerant vendor' doing business in any building, structure, tent, car, stationary vehicle, store room or certain place of any kind, for the exhibition

or sale of any manufactured goods, jewelry, wares or merchandise, for each such building, structure, tent, car, stationary vehicle, store room or place, two hundred and fifty dollars ($250)."

At the institution of this suit plaintiff's representatives were scheduled to take photographs in the J. C. Penney store in Tucumcari, Quay County, New Mexico, and plaintiff would not pay the above described tax, claiming that it is unconstitutional as applied to its operations.

The defendants Victor C. Breen, Claude Moncus and Earl E. Hartley will prosecute plaintiff's representatives under the provisions of the above quoted statutes should these representatives persist in engaging in the taking of orders for photographs and taking photographs as above described.

The plaintiff contends that the Peddlers and Itinerant Vendor's Act referred to above is invalid and unconstitutional under the Constitution of the United States for the reasons:

(a) The Act is, in effect, a tax on the interstate business carried on by the plaintiff and imposes an undue burden on interstate commerce; and

(b) The licensing costs imposed by the Act make it prohibitive for plaintiff to carry on its operations in New Mexico, and the Act discriminates against the plaintiff, as a non-resident.

It is well settled that a tax is not invalid and unconstitutional merely because it operates on what may be interstate commerce, for interstate commerce must pay its own way and pay its just share of the state tax burden, even though it increases the cost of doing business. **General Motors Corporation v. Washington et al.**, 377 U. S.

436 (at 439), and cases therein cited. The determining factor is whether or not the State tax, in its operation, imposes an undue burden on interstate commerce or by its operation discriminates against those engaged in interstate commerce. An occupation tax non-discriminatory and valid on its face may, in actual operation, become most discriminatory and invalid. The leading case in this respect is **Nippert v. City of Richmond**, 327 U. S. 416 (1946), wherein the Court declared discriminatory and invalid in its operation an ordinance of the City of Richmond laying an annual license tax in the following terms:

> "'[Upon] . . . —Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. . . .'"

This case was followed in **Bossert v. City of Okmulgee**, 260 Pac. 2d 429 (Okla. 1953), and in **Nicholson v. Forrest City**, 228 S. W. 2d 53 (Ark. 1950). In this last named case the Court sums up the decision in **Nippert** very succinctly on page 55 as follows:

> "In the Nippert case, as in the present cases, the ordinance made no distinction between out-of-state solicitors, or solicitors for out-of-state sellers, and local solicitors for domestic sellers. On its face the ordinance and the tax operated equally upon solicitors for interstate sales and solicitors for intrastate sales. It levied a $50 annual tax on each. . . . The Supreme Court pointed out, however, that the tax sustained in the Berwind-White case was a sales tax on sales completed in New York, levied on a percentage basis, therefore burdening each interstate sale thus

completed just as much as a corresponding local sale was burdened, and no more. Not only was the tax non-discriminatory on its face; it was also non-discriminatory in its practical effect as well. Contrariwise, the Richmond tax, superficially the same on all solicitation whether for interstate or intrastate sales, in average practice imposed much the heavier burden on salesmen for extrastate sellers. 'So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or of returns from it.' If such a tax might be levied by one town, it might be levied by ten towns, or twenty, or all the towns in a state, or all the towns in all the states to which a seller's commerce might extend."

The facts of this case are very similar to the situation in **Nippert, Bossert** and **Nicholson**, and the operation of the New Mexico Statutes which might in effect require plaintiff or its representatives to pay a tax or license charge of Three Hundred Fifty ($350.00) Dollars on each of several representatives in some fourteen (14) different localities of the State of New Mexico. This would be an undue and, in fact, prohibitive burden upon interstate commerce. It is apparent that the New Mexico Statutes in question are, as to the plaintiff, invalid and unconstitutional in their operation.

It is likewise apparent that this action is a controversy arising under the Constitution of the United States and involves sums in excess of $10,000.00 and that the plaintiff has no plain, speedy and efficient remedy in the Courts of the State of New Mexico.

The permanent injunction prayed by the plaintiff should issue and it is so ordered. Settle form of judgment on notice.

The foregoing opinion shall constitute the findings of fact and conclusions of law of the Court.

Dated this 22nd day of September, 1964.

Circuit Judge Seth concurs in the foregoing opinion.

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Circuit Judge,
H. Vearle Payne,
District Judge,
Howard C. Bratton,
District Judge.

This copy serves as notice of entry.

Wm. D. Bryars, Clerk,
Sept. 22, 1964.
(Date)